United States Supreme Court,

OCTOBER TERM, 1903.

No. 357.

W. S. KIRBY, APPELLANT,
vs.
AMERICAN SODA FOUNTAIN COMPANY.

Appeal from the United States Circuit Court for the Northern District of Texas.

I.

The answer of appellant to the motion to dismiss the appeal.

The jurisdiction of this court is granted by the fifth section of the Judiciary Act approved March 3, 1891. So much of said section as affects the jurisdiction of this court of this appeal, follows:

"Sec. 5. That appeals or writs of error may be taken from the District Courts, or from the existing Circuit Courts direct to the Supreme Court in the following cases:

In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

The question of the jurisdiction of the Circuit Court was in issue and was certified to the Supreme Court from the court below for decision, as will appear from the Petition for appeal, and the Order allowing the appeal, which Petition for appeal and order allowing the appeal follow:

"Your petitioner, W. S. Kirby, respectfully represents that there is manifest error committed to the injury of the petitioner by the final decree pronounced in this cause on the 27th

day of May, 1903, and by the interlocutory order and decree overruling the petitioner's plea to the jurisdiction to the court over petitioner as the defendant in the cross bill filed by the American Soda Fountain Company in the above cause, which said plea to the jurisdiction called to the court's attention the fact that the amount in controversy in said cross bill was less than the sum or value of two thousand dollars, and that the original bill in the cause had been dismissed by the complainant therein, with the consent of the court without prejudice at a former term of the court. That said plea to the jurisdiction was overruled, and your petitioner failed to file further defenses to the cross bill and final decree was entered in favor of the complainant in the cross bill against your petitioner, on the 27th day of May, 1903, for the sum of $1,833.39.

Wherefore, petitioner, W. S. Kirby, considering himself aggrieved, prays an order granting an appeal from the said final decree and interlocutory order overruling his plea to the jurisdiction to the Supreme Court of the United States, as authorized by section V of the act of Congress of the United States approved March 3, 1891. And petitioner herewith files his bond in the penal sum of $2,500.00, which bond is approved by the Honorable Edward R. Meek, one of the judges of this court.

J. M. McCORMICK,
WENDEL SPENCE,
Solicitors for Petitioner, W. S. Kirby.

Upon consideration of the petition for appeal to the Supreme Court of the United States, filed herein by W. S. Kirby, it is ordered that said appeal be granted, bond therefor in the penal sum of $2,500.00 having been executed and approved by the court, and that a supersedeas be granted.

This appeal is granted solely upon the question of jurisdiction which, as set forth in the foregoing petition for appeal, is certified to the Supreme Court of the United States, and in order that the Supreme Court may properly determine the question of jurisdiction (no other question having been tried in the Circuit Court), it is ordered that a transcript of the record, proceedings and papers upon which the decree was made,

duly authenticated, be sent to the Supreme Court of the United States.

Dated, this 8th day of June. A. D. 1903, and during the term at which said decree was entered.

EDWARD R. MEEK,
District Judge."

The only question put in the issue in the court below, was the jurisdiction of the Circuit Court over the controversy in the cross bill, and this question, as above shown, has been certified. It would seem that the jurisdiction of this court to entertain the appeal is obvious, and that the motion to dismiss is void of merit, even of color.

II.

Touching the jurisdiction of the Circuit Court to proceed on the cross bill after the dismissal of appellant's bill, the question for determination, is the jurisdictional competency of a Circuit Court of the United States to proceed with a cross bill asking affirmative relief after the dismissal of all other bills where the amount in controversy in the cross bill does not exceed, exclusive of interest and costs, the sum or value of two thousand dollars, there being no fund or property in the possession of the court. This question arises in the record in this way:

The appellant sued the appellee in the State Court on May 16, 1901, for fifteen hundred dollars for deceit (Record, pages 1 and 2.) Citation issued on May 18, 1901, requiring defendant to answer on the second Monday in September, 1901, (Record, page 3.) Defendant answered September 9, 1901, (Record, page 4.) Appellant filed first amended original petition on December 12, 1901, increasing his claim for damages to twenty-five hundred dollars, and prayed for cancellation of an obligation held by defendant, given at the time the alleged deceit was practiced (Record, pages 5, 6, 7, 8 and 9.) On January 22, 1902, the defendant filed its application and bond for removal to the United States Circuit Court (Record, pages 9, 10 and 11.) The Order for removal was granted on February

3, 1902 (Record, page 12.) The Transcript was duly filed in the Circuit Court May 11, 1902 (Record, page 13), and on the same day the defendant filed in the Circuit Court its demurrer, answer and cross complaint, in which cross complaint, or cross bill, the defendant (appellee here) prayed a recovery against the appellant for seventeen hundred dollars, with interest and foreclosure of a mortgage lien upon certain personal property (Record, pages 13 to 30.) On May 13, 1902, subpœna issued on the cross bill (Record, page 30) which was served on appellant on May 19, 1902 (Record, page 31.) On June 20, 1902, appellant filed his motion to have the cause which had been docketed as an equity case, transferred to the law docket (Record, page 31); and on June 20, 1902, the court below made an order as follows:

"Complainant coming and asking that the original bill of complaint be dismissed without prejudice, and it appearing to the Court that said request should be granted. It is therefore ordered that the original bill of complaint herein, be and the same is hereby dismissed without prejudice to the right of the complainant to proceed further on the cause of action set forth in said bill hereafter as he may be advised.

It is further ordered that the costs of the original bill and proceedings thereon herein be adjudged against complainant, for which execution may issue. (Record, page 31.)"

On July 24, 1902, the appellant filed his plea to the cross bill, in which he alleged that the cross bill was not within the jurisdiction of the Circuit Court, because the amount in dispute under the allegations did not exceed, exclusive of interest and costs, the sum or value of two thousand dollars, and that the amount sought to be recovered, exclusive of interest and costs, was the sum of seventeen hundred dollars, which was the only matter or amount in dispute in said cross bill (Record, page 32.) On August 14, 1902, the plea was set down for a hearing by the appellee (Record, page 33), and on the 5th day of February, 1903, the Court overruled the plea; to which action appellant excepted (Record, page 34.) Judgment *pro confesso* was taken on the first day of April, 1903 (Record,

pages 34 and 35), and final decree was rendered on May 27, 1903, in favor of appellee for seventeen hundred dollars, with interest, and for foreclosure on the mortgaged property (Record, pages 35, 36, 37.)

The errors assigned are:

1. Because the court had no jurisdiction to render the decree on the cross bill (after the original bill had been dismissed with leave of the court without prejudice) for the lack of jurisdictional amount in controversy.

2. Because the court should have sustained the plaintiff's plea to the jurisdiction interposed against the cross bill and dismissed the cross bill. (Record, page 39.)

III.

The original bill and the cross bill constitute one suit when the cross bill prays no affirmative relief, or depends on the original bill for jurisdiction. In such cases the cross bill cannot stand as an original bill, and the dismissal of the original bill disposes of cross bill. The appellant contends that the cross bill in this record was dependent, and that the dismissal of the original bill *ipso facto* disposed of the cross bill. Or that if the dismissal of the original bill did not dismiss the cross bill also, it nevertheless left the cross bill subject to any attack which might have been made on it if filed as an original bill. That after the appellant's bill was dismissed, the cross bill could not depend on it for jurisdiction, and at most, could only be proceeded on in the same manner as if it had been filed as an original bill. Tested as an original bill, the cross bill lacked an essential jurisdictional element; there was not a sufficient amount in controversy. If the dismissal of the appellant's bill left the cross bill "for disposition in the same manner as if it had been filed as an original bill," then clearly the cross bill should have been dismissed by the Circuit Court, because had the cross bill been filed as an original bill, it would necessarily have been so dismissed.

It is only material to enquire whether the Circuit Court might not have declined to permit the dismissal by appellant of his bill, had this dismissal been resisted by the cross complainant, for the purpose of discovering that there is a rule in such cases. The very existence of this rule vesting discretion in the Court as to allowing the dismissal of an original bill where its exercise would be oppressive to a cross complainant, illustrates the force of such order when made. The order of dismissal in this record was not resisted, and was never vacated

Cases can be found where the original bill has been dismissed and the cross bill retained, but in no such case, so far as a diligent research has disclosed, has it appeared that the amount in controversy in the cross bill was insufficient to have supported the jurisdiction of the trial court had the cross bill been filed as an original bill; nor where the cross bill lacked any necessary averment of an original bill.

It may be that if the objection to the jurisdiction of the court over the person of the defendant in a cross bill were interposed after the dismissal of an orignal bill, this personal privilege should be held to have been waived by the institution of the original suit. No such question, however, arises in this record. The jurisdictional defect in the cross bill is one that cannot be waived. Consent cannot confer on a Circuit Court of the United States competency to adjudicate a controversy involving less than the minimum amount justiciable there.

The following cases are thought to bear on the question under discussion:

C. and A. R. R. Co. v. Union Rolling Mill Co., 109 U. S., pp. 713 to 719.
Pullman Palace Car Co. v. Cent. Trans. Co., 171 U. S., p. 146 et seq.
San Diego Flume Co. v. Souther, 90 Fed., p. 167.
Cabaniss v. Reco Min. Co., 116 Fed., p. 323.
City of Detroit v. Detroit City Ry. Co., 55 Fed., pp. 571 to 575.
Small v. Peters, 104 Fed., pp. 402 to 404.
Electric Accum. v. Brush Elec. Co., 44 Fed., p. 603.

IV.

It is respectfully submitted that the motion to dismiss should be denied, and if this court finds color in the record to support the motion to dismiss, that the motion to affirm be denied, and that the decree of the lower court be reversed with instructions to dismiss the cross bill.

Joseph H McCormick

Solicitor for W. S. Kirby, Appellant.